IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
v.	:	No. CR-03-BE-0530-S
RICHARD M. SCRUSHY,	:	
Defendant	:	

RESPONSE OF THE UNITED STATES TO LETTER BRIEF OF DEFENDANT RICHARD M. SCRUSHY OF JUNE 25, 2004

1. Scrushy initially contends (Letter 2-4) that two statutes imposing civil penalties on persons who "willfully and knowingly certif[y] [or willfully and knowingly cause another to certify] * * * material and false statement[s]" in connection with resident assessments in certain nursing facilities, see 42 U.S.C. 1395i-3(b)(3)(B)(ii) and 1396r(b)(3)(B)(ii), are "quite different" from 18 U.S.C. 1350(c)(2). The contention ignores the plain language of all three statutes and the obvious similarities among them. Under all three statutes, no person is exposed to liability, whether civil or criminal, until and unless that person willfully and knowingly certifies, or willfully and knowingly causes another to certify, a material false statement. Section 1350(c)(2) merely uses more elaborate, but still clearly intelligible, language -- e.g., the underlying periodic report "does not comport" with the requirement that it "fully compl[y]" with certain provisions of the Securities Act and "fairly present[], in all material respects" the issuer's financial condition -- to describe the material falsity element. Section 1350(c)(2) also has the same "willfulness" and "knowledge" requirements that the nursing facilities statutes have.

That the nursing facilities statutes impose civil penalties and Section 1350(c)(2) imposes criminal sanctions, cf. Letter 2, is irrelevant. The "power to define criminal offenses and to prescribe punishments to be imposed on those found guilty of them resides wholly with the Congress." Albernaz v. United States, 450 U.S. 333, 344 (1981) (quoting Whalen v. United States, 445 U.S. 684, 689 (1980); see Fallada v. Dugger, 819 F.2d 1564, 1572 (11th Cir. 1987). Indeed, "Congress may impose both a criminal and a civil sanction in respect to the same act or omission." Helvering v. Mitchell, 303 U.S. 391, 399 (1938); see United

States v. Killough, 848 F.2d 1523, 1534 (11th Cir. 1988) ("for one act, a person may be held both criminally and civilly liable"). In the case of the nursing facilities statutes, Congress chose to impose only civil penalties for the willful and knowing certification of material false statements in resident assessments. In the case of Section 1350(c)(2), it has simply exercised its legislative discretion to impose criminal sanctions on the willful and knowing certification of materially false statements in the periodic reports required by the Securities Act.

Scrushy seeks to distinguish the nursing facilities statutes from Section 1350(c)(2), presumably on the ground that the former are constitutional and the latter is not, see Letter 2, but he appears to doubt that even the nursing facilities statutes are constitutional, see ibid. ("these statutes present the same vagueness problem * * *"). We submit that all three statutes, with their stringent scienter requirement of willfulness with respect to a material false statement, are plainly constitutional.

Scrushy suggests (Letter 2-3) that Section 1350(c)(2) should be construed in light of Section 1350 (c)(1). In our view, such a construction is unnecessary because Scrushy is charged only under Section 1350(c)(2), see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982), and because Section 1350(c)(2)'s stringent scienter requirement of willfulness renders it plainly constitutional, see United States v. Waymer, 55 F.3d 564, 568 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996). Nevertheless, even if such a construction were necessary, Section 1350(c)(1) would not help Scrushy. The provision has its own scienter requirement of knowledge, which has a well-defined meaning in the criminal law (discussed at Pages 18-19 of our initial response to Scrushy's motion), and is therefore plainly constitutional.

In the same discussion, Scrushy cites (Letter 3) the Supreme Court's recent decision in Branch v. Smith, 538 U.S. 254, 281 (2003), to the effect that statutes should be interpreted in the context of the body of law to which they belong. We agree. When applied in Scrushy's case, however, the principle is fatal to his argument. As we noted in our initial response to Scrushy's motion (at Page 18), a statutory requirement that an act must be willful or purposeful relieves the statute of the objection that it punishes without warning an offense of which the accused was unaware. See United States v. Waymer, 55 F.3d at 568; see also United States v. Hasner, 340 F.3d 1261, 1269 (11th Cir. 2003). And as well as giving fair warning of prohibited conduct, such a scienter requirement discourages "unscrupulous enforcement." See United States v. Acheson, 195 F.3d 645, 652 (11th Cir. 1999); see also United States v. Panfil, 338 F.3d 1299, 1301 (11th Cir. 2003). Thus, when a statute requires the government to prove the

defendant's specific criminal intent in order to convict, the statute is not unconstitutionally vague as applied to that defendant. See Hasner, 340 F.3d at 1269. To convict Scrushy under Section 1350(c)(2) in Counts 48-50, the government is required to prove his specific criminal intent to falsely certify the pertinent 10-Q reports. As a result, Section 1350(c)(2) cannot be unconstitutionally vague as applied to him.

2. Scrushy further notes (Letter 3) that the United States Code contains "a cluster of statutes in which the term 'willfully,' while not modifying conduct that is itself wrongful, nevertheless when read together with other language in the statute includes some form of falsity." Scrushy maintains (id. at 4) that such statutes are "clearly distinguishable" from Section 1350(c)(2). Scrushy is mistaken. Section 1350, taken as a whole (as it must be, see, e.g., Hill v. Colorado, 530 U.S. 703, 733 (2000)), is precisely the kind of statute he describes. The falsity element is supplied by (1) the provision in Section 1350(b) requiring the certification to state that the report it accompanies "fully complies" with the pertinent requirements of the Securities Act and "fairly presents, in all material respects," the financial condition and operational results of the issuer, and (2) the provisions, in both Sections 1350(c)(1) and (c)(2), which require that the certifier know that the report he is certifying "does not comport" with the requirements of Sections 1350(a) and (b). In other words, before the certifier can be held criminally responsible for his certification, he must know that the report he is certifying is materially false. As noted above, Section 1350's use of phrases like "fully complies," "fairly presents, in all material respects," and "does not comport" is merely a more elaborate, but still clearly intelligible, way of saying that knowledge of material falsity in the underlying periodic report is a prerequisite for criminal liability under the statute.

We are aware of no case, and Scrushy has cited none, which holds that congressional use of any of the terms challenged by Scrushy here -- "willfully," "fairly presents," "in all material respects" -- renders the statutes containing them unconstitutionally vague. Indeed, the case law is all to the contrary. See Pages 18-22 of our initial response to Scrushy's motion (discussing well-settled meanings of terms like "willfully" and "material").

3. Scrushy contends (Letter 4-5) that Section 1350(c)(2) is unconstitutionally vague because the phrase "willfully certifies" in that provision does not describe criminal conduct. The contention rests on a mistaken premise, namely, that the "willfully certifies" phrase should be isolated from the rest of Section 1350 and, in particular, should not be read together with The language "knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in

this section," including the requirement that the "information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer." 18 U.S.C. 1350(b) and (c)(2). It is, of course, axiomatic that the statute must be construed as a whole in evaluating Scrushy's vagueness challenge. See Hill v. Colorado, 530 U.S. 733; United States v. Musser, 856 F.2d 1484, 1486 (11th Cir. 1988), cert. denied, 489 U.S. 1022 (1989). When Section 1350(c)(2) is construed with the rest of Section 1350, it fairly describes the following criminal conduct: the willful certification of a material false statement in a company's periodic report with knowledge not only that the statement is materially false but also with knowledge that the law forbids such a certification. In other words, when the statute is construed as a whole, Scrushy's argument collapses.

4. Scrushy also argues (Letter 5-7) that Section 1350(c)(2) is unconstitutional as applied because it "does not contain meaningful or discernible standards of the criminal state of mind and criminal conduct to be condemned." Even a cursory review of Section 1350 reveals that before criminal liability can be imposed under Section 1350(c)(2), (1) the periodic report to be certified by a corporate officer must be materially false in that it does not fairly present, "in all material respects, the financial condition and results of operations of the issuer" (Section 1350(b)); (2) the certifying officer must know of the material falsity of the report; and (3) the certifying officer must nevertheless falsely certify to the material accuracy of the report with the intent to violate the law prohibiting such materially false certifications. The plain language of the statute thus refutes Scrushy's claim that it contains no meaningful standards.

5. Scrushy next contends (Letter 6-7) that the allegations in the indictment do not cure the "inherent vagueness deficiencies" of Section 1350(c)(2). As we have shown, there are no such deficiencies in that section. The allegations in the indictment, which must be taken as true for purposes of Scrushy's motion, see SEC v. Zandford, 535 U.S. 813, 818 (2002), merely make it clear that Section 1350(c)(2) is constitutional as applied in this case. Count 48 of the indictment alleged that Scrushy willfully certified a statement required by Section 1350 while knowing that the periodic report accompanying the statement did not comport with Section 1350's requirements because the information contained in it

> did not fairly present, in all material aspects, the financial condition and results of operations of HealthSouth because said information materially overstated HealthSouth's net income of each of the periods set forth in the report, and materially overstated the value of HealthSouth's assets at the end of each of said periods.

Doc. No. 1, at 28-29. Counts 49-50 contained similar allegations. See id. at 29-31. As we noted in our initial response to Scrushy's motion and at oral argument, Scrushy cannot credibly contend that the reports at issue in this case, which are alleged to have "materially overstated" HealthSouth's net income and assets, fairly presented, in all material aspects, the company's financial condition and operating results if the government proves those allegations. As applied to Scrushy, Section 1350(c)(2) cannot be unconstitutionally vague.

Scrushy seeks (Letter 6) to forestall the Court's consideration of the $2.7 billion extent of the material overstatements of income alleged in Counts 48-50 because that amount was not set forth in the paragraphs incorporated by reference in those counts. That amount, however, was alleged in the indictment, see Doc. No. 1, at 8 (Count 1, ¶ 24 (Manner and Means of Conspiracy)), 11-12 (¶¶ 41-42 (Overt Acts)), and the Court is therefore not only entitled to consider it, but is obliged to take it as true. See SEC v. Zandford, 535 U.S. at 818.

Scrushy also maintains (Letter 6) that the term "material" does not clarify Section 1350(c)(2) because the term "has a highly technical meaning under the federal security laws." In such cases, however, courts contemplate that affected parties will make reasonable inquiries into the meaning of relevant statutory terms. See Village of Hoffman Estates, 455 U.S. at 498 (businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action; regulated enterprise may have ability to clarify meaning of regulation by own inquiry or by resort to administrative process); McGowan v. Maryland, 366 U.S. 420, 428 (1961) (business people of ordinary intelligence could ascertain exceptions encompassed by statute as matter of ordinary commercial knowledge or by making reasonable investigation; under such circumstances, no need to guess at statute's meaning in order to determine what conduct it makes criminal); Wilson v. State Bar of Georgia, 132 F.3d 1422, 1430 (11th Cir. 1998) (amendments to bar rules not void for vagueness because, inter alia, attorneys can seek guidance on meaning); United States v. Cure, 804 F.2d 625, 630 (11th Cir. 1986) (rejecting lack-of-fair-notice claim because law of Circuit clear on filing requirements for currency transaction reports). In any event, Scrushy cannot credibly claim that a $2.7 billion overstatement of HealthSouth's income was not "material" under any reasonable definition of that term.

6. Scrushy further contends (Letter 7) that the Supreme Court's decision in United States v. Lanier, 520 U.S. 259, 266-267 (1997), supports his void-for-vagueness claim. It does not. In relevant part, the Court said:

> [D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. * * *. [T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

In the present case, the Court would not be adopting a "novel construction of a criminal statute" in finding that Section 1350(c)(2) is not void for vagueness. "[P]rior judicial decision[s]" construing terms like "willfully" and "material" have "fairly disclosed" that Scrushy's conduct fell within the scope of Section 1350(c)(2). We have discussed such decisions on Pages 18-22 of our initial response to Scrushy's motion, and incorporate that discussion by reference here.

Moreover, in a passage not referenced by Scrushy, the Court in Lanier went on to say, quoting Screws v. United States, 325 U.S. 91, 105 (1945), that

> [w]hen broad constitutional requirements have been 'made specific' by the text or settled interpretations, willful violators 'certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. * * *. When they are convicted for so acting, they are not punished for violating an unknowable something.'

520 U.S. at 267. In the present case, terms like "willfully," "knowing," and "material" have been "made specific" by "settled interpretations." As a result, Scrushy, whom the indictment alleges to be a "willful violator" of Section 1350(c)(2), is in "no position" to say that he "had no adequate advance notice that [he] would be visited with punishment." Screws, 325 U.S. at 105. If Scrushy is convicted under that section, he will not be "punished for violating an unknowable something." Ibid.

7. Scrushy's final argument, "Saying It Is a Crime Does Not Make It So," see Letter 7-8, is erroneously based on his assertion that Section 1350(c)(2) makes it "a crime to willfully certify SEC reports" (Letter 7). The statute does no such thing. What it does make a crime is the willful certification of a materially false report with knowledge that the report is materially false, with knowledge that the law forbids such a false certification, and with the specific intent to violate the law. In light of these stringent scienter requirements and the indictment's allegations of material overstatements of HealthSouth's income and assets in Counts 48-50, Section 1350(c)(2) is undoubtedly constitutional as applied to Scrushy's conduct in this case.

WHEREFORE, for the reasons set forth above and in our initial response to Scrushy's motion to dismiss Counts 48-50 of the indictment, the motion to dismiss should be denied,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Response of the United States to the Letter Brief of Defendant Richard M. Scrushy of June 25, 2004, were sent this day by first-class mail to counsel for Scrushy at the following addresses:

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